

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHARLES BOHAN,	§
	§ No. 66, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0804025609
	§
Plaintiff Below-	§
Appellee.	§

Submitted: June 8, 2012

Decided: June 15, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 15th day of June 2012, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Charles Bohan, filed an appeal from the Superior Court’s January 11, 2012 order adopting the November 23, 2011 report of the Superior Court Commissioner,¹ which recommended that Bohan’s first motion for postconviction relief pursuant to Superior Court

¹ Del. Code Ann. tit. 10, §512(b); Super. Ct. Crim. R. 62.

Criminal Rule 61 be denied.² We find no merit to the appeal. Accordingly, we affirm.

(2) The record reflects that, in March 2009, Bohan was found guilty of two counts of Aggravated Menacing, Possession of a Firearm During the Commission of a Felony and Possession of a Firearm By a Person Prohibited. He was sentenced to a total of 17 years of Level V incarceration, to be suspended after 8 years for decreasing levels of supervision. Bohan's convictions were affirmed by this Court on direct appeal.³

(3) In this appeal, Bohan claims that the Superior Court abused its discretion by a) admitting into evidence certain prejudicial crime scene photographs; b) failing to declare a mistrial when a witness, whom the jury was told by the defense would exculpate the defendant, was unavailable to testify; and c) admitting a witness statement into evidence without a proper foundation under Del. Code Ann. tit. 11, §3507. Although not expressly designated as such, Bohan also asserts claims of ineffective assistance of counsel. He alleges that his trial counsel a) failed to subpoena an important defense witness, resulting in prejudice to him; and b) failed to properly

² Because this was Bohan's first postconviction motion and claims of ineffective assistance of counsel were asserted, his trial counsel's affidavit was requested. *Horne v. State*, 887 A.2d 973, 975 (Del. 2005); Super. Ct. Crim. R. 61(g) (1) and (2).

³ *Bohan v. State*, 990 A.2d 421 (Del. 2010).

impeach a witness for the State in connection with the witness's §3507 statement.

(4) Bohan's first claim is that the Superior Court erred by admitting a number of crime scene photographs into evidence. Bohan contends that he had no connection to the crime scene depicted in the photographs and that the probative value of the photographs outweighed their prejudicial effect.⁴ The record before us reflects that the photographs were of a parking lot where Bohan pointed a gun at police, Bohan's car and the motel room where the gun was found. There was, therefore, a connection between the photographs and Bohan. Moreover, it was for the trial judge to determine whether the probative value of the photographs outweighed their possible prejudicial effect.⁵ We find no abuse of discretion on the part of the Superior Court in ruling as it did. We, therefore, conclude that Bohan's first claim is without merit.

(5) Bohan's second claim is that the Superior Court erred when it failed to declare a mistrial when an important defense witness was unavailable to testify. The record reflects that this claim was raised by Bohan in his direct appeal and decided against him by this Court.⁶ As such,

⁴ D.R.E. 403.

⁵ *Williams v. State*, 494 A.2d 1237, 1241 (Del. 1985).

⁶ *Bohan v. State*, 990 A.2d at 423-24.

it is procedurally barred as previously adjudicated.⁷ While such a claim may be reconsidered in the interest of justice,⁸ our review of the record in this case does not reveal any such basis for reconsideration of the claim. As such, we conclude that Bohan's second claim of error on the part of the Superior Court is unavailing.

(6) Bohan's third claim is that the Superior Court erred by admitting a statement into evidence without the proper foundation under Del. Code Ann. tit. 11, §3507. The record reflects that this claim was raised neither at trial nor on direct appeal. Therefore, Bohan must demonstrate cause for the procedural default and resulting prejudice.⁹ Bohan does neither. Nor does he demonstrate a miscarriage of justice that would overcome the procedural bar.¹⁰ The record reflects that the prosecutor established the proper foundation for admission of the witness statement.¹¹ Moreover, the situation that presented itself at Bohan's trial---i.e. where a witness testifies that he does not recall what he said in his previous statement---is precisely the situation that §3507 was designed to address.¹²

⁷ Super. Ct. Crim. R. 61(i) (4).

⁸ Id.

⁹ Super. Ct. Crim. R. 61(i) (3)(A) and (B).

¹⁰ Super. Ct. Crim. R. 61(i) (5).

¹¹ *Gomez v. State*, 25 A.3d 786, 795 (Del. 2011).

¹² *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975).

In the absence of any error on the part of the Superior Court, we conclude that Bohan's third claim also is without merit.

(7) Bohan's ineffective assistance of counsel claims are governed by the *Strickland* standard.¹³ Under that standard, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.¹⁴ Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.¹⁵

(8) Bohan's first ineffectiveness claim is that his counsel failed to subpoena a crucial defense witness, thereby prejudicing his case. The record reflects that the individual in question was actually in custody in Delaware and was available to be called as a witness. Defense counsel interviewed him and ascertained that he would not offer testimony favorable to the defense and, in fact, would have directly implicated Bohan as the one who pointed the gun at police. Because the witness was available and apparently willing to testify, no subpoena was necessary. Because his testimony would

¹³ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

¹⁴ *Id.*

¹⁵ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

have been harmful to the defense, however, counsel properly declined to call him as a witness.

(9) As for Bohan's second claim that his counsel failed to impeach a witness regarding his prior §3507 statement, this claim, too, is unavailing. The record reflects that, contrary to the assertions of Bohan, defense counsel thoroughly cross-examined the witness regarding his prior statement to police, establishing for the jury that Bohan was not personally present in the hotel room depicted in the photographs and that the witness was on Xanax at the time of his statement, all of which was helpful to the defense. In the absence of any evidence of error on the part of counsel resulting in prejudice to Bohan, we conclude that his ineffectiveness claims are without merit.¹⁶

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

¹⁶ To the extent that Bohan advanced additional ineffectiveness claims in the Superior Court that have not been presented in this appeal, any such claims have been waived and we decline to address them. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).